87-286

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC. AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Federal Pre-emption

Are state law claims regarding alleged acts or omissions of telecommunications carriers in the provision of interstate telecommunications services pre-empted by the Communications Act of 1934?

Are state-law claims regarding alleged acts or omissions of interstate telecommunications carriers pre-empted by federal law where the Federal Communications Commission has reviewed the same alleged acts and omissions practices of which Respondent complains, found those alleged acts and omissions to be specifically regulated by Sections 203, 201(b) and 202(a) of the Communications Act of 1934, and has held that the Petitioner has acted reasonably and lawfully?

Primary Jurisdiction

Are state courts required under the doctrine of primary jurisdiction to defer to the Federal Communications Commission for initial determination of the reasonableness of alleged acts and omissions of telecommunications carriers in the provision of interstate telecommunications services where the alleged acts and omissions are regulated by the Communications Act of 1934?

RULE 28.1 LIST

US Telecom, Inc.

U.S. Telephone, Inc.

U.S. Telephone of the Midwest, Inc.

US Telecom - Communications Services Company

United Telecommunications, Inc.

US Sprint Communications Company, a New York General Partnership of US Telecom, Inc. and GTE Sprint Communications Corporation (a wholly -owned subsidiary of GTE Corporation).

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U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC. AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

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SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI

US Telecom, Inc., formerly known as U.S. Telephone, Inc. and U.S. Telephone of the Midwest, Inc., hereby petitions for a writ of *certiorari* to the Appellate Court of the First District of the State of Illinois to review the Illinois Appellate Court's judgment in *Speakers of Sport, Inc. v. U.S. Telephone, Inc. and U.S. Telephone of the Midwest, Inc.*, 149 Ill.App.3d 898, 501 N.E.2d 318, (1st Dist. 1986).

OPINIONS BELOW

The judgment of the Circuit Court of Cook County, Illinois is unreported. The order and transcript of judgment is reprinted as Appendix D to this petition. The opinion of the Appellate Court of the First District of the State of Illinois entitled *Speakers of Sport, Inc. v. U.S. Telephone, Inc., et al.* is reported at 149 Ill.App.3d 898, 501 N.E.2d 318 (1st Dist. 1986), and is reprinted as Appendix A to this petition. The order of the Illinois Supreme Court denying leave to appeal is reported at 114 Ill.2d 558, 508 N.E.2d 736 (1987) and is reprinted as Appendix C to this petition. The order of the Illinois Supreme Court denying leave to file a motion for reconsideration of the denial of the petition for leave to appeal is unreported and is reprinted as Appendix B to this petition.

JURISDICTION

The opinion and judgment of the Illinois Appellate Court, First District, were issued on November 21, 1986. (Appendix A, *infra.*) A timely petition for leave to appeal was filed with the Illinois Supreme Court, said petition being denied on April 15, 1987. (Appendix C, *infra.*) A timely motion for leave to file a motion for reconsideration of the denial of the petition for leave to appeal was filed with the Illinois Supreme Court, said motion being denied on May 19, 1987. (Appendix B, *infra.*) This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The following federal constitutional provision and statutes, all of which are set forth in Appendix J, are involved in this case:

United States Constitution, Article VI, Clause 2;

Federal Communications Act of 1934, 47 U.S.C. Sec. 151;

Federal Communications Act of 1934, 47 U.S.C.

Sec. 201(b);

Federal Communications Act of 1934, 47 U.S.C. Sec. 202(a);

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Federal Communications Act of 1934, 47 U.S.C. Sec. 207;

Federal Communications Act of 1934, 47 U.S.C. Sec. 208;

Federal Communications Act of 1934, 47 U.S.C. Sec. 209;

Federal Communications Act of 1934, 47 U.S.C. Sec. 401(b);

Federal Communications Act of 1934, 47 U.S.C. Sec. 402(a);

Federal Communications Act of 1934, 47 U.S.C. Sec. 407;

United States Code, Title 28, Chapter 158, Sec. 2342.

The following Illinois statute, as set forth in Appendix J, is involved in this case:

Illinois Consumer Fraud and Deceptive Practices Act, Illinois Revised Statutes, 1986, Chapter 121 1/2, Sec. 262.

STATEMENT OF THE CASE

Speakers of Sport, Inc. filed a purported class action on behalf of all the customers of U.S. Telephone, Inc., and U.S. Telephone of the Midwest, Inc., (collectively now known as US Telecom, Inc. or simply US Tel) alleging that in the provision of interstate telecommunications, US Tel charged for unanswered calls in breach of the contract agreement between US Tel and its customers and that the failure to disclose these charging practices constituted a fraudulent misrepresentation by omission which violated both the Illinois Consumer Fraud and Deceptive Practices Act and the Illinois Deceptive Trade Practice Act. Appendix H. Two days later, the same complaint was filed in the United States District Court for the Northern District of Illinois *sub nom. Locks v. U.S. Telephone of the Midwest, Inc.*, District Court No. 84 C 1465, alleging the same identical charges adding only a fifth count alleging that the same acts and omissions constituted a violation of the Federal Communications Act of 1934, 47 U.S.C. Sec. 151 *et seq.* Appendix I.

These claims arose from a technical problem common to all non-AT&T interstate carriers resulting from the FCC decision to open interstate telecommunications to competition (*Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington U.T. Commission v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975)) and the federal court's ordered divestiture of AT&T. *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Consent Decree). The local exchanges could not provide the non-AT&T companies with a feature known as answer supervision which informed the carriers as to when an interstate call was answered. The Consent Decree required the local exchanges to correct this technical deficiency by September 1, 1986. The FCC was regulating the problem during the transition.

A plethora of these class action suits were filed throughout the country alleging the same conduct against the various interstate telecommunications carriers which had initiated interstate telecommunications competition with AT&T. The Judicial Panel For Multidistrict Litigation (JPML) determined that these suits evolved from a common question of fact and ordered that all suits filed in the Federal District Courts be transferred for pretrial purposes to the Eastern District of Michigan in order to promote judicial economy and to avoid inconsistent rulings. *In re Long Distance Telecommunications Litigation*, MDL No. 598 (Appendix G)[1]. The *Locks* complaint was included

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[1] Prior to transfer, five Federal District Courts had dismissed a total of six such complaints finding that state common law and state statutory causes of action were 1) pre-empted by federal law (*Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984); *Schuster, et al. v. GTE Sprint Communications Corp.*, No. C 83-5374 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2385 (9th Cir. January 9, 1985); *Lee, et al. v. Western Union Telegraph Co.*, No. C 84-1472 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 9, 1985); *Lee, et al. v. MCI Telecommunications Corp.*, No. C 84-1471 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 9, 1985)), and/or 2) that primary jurisdiction over the claims rested in the FCC (*Control Electronics, Inc., et al. v. Southern Pacific Communications Co., et al.*, No. 83-1010 (E.D. Mich. 1984), *appeal dismissed*, No. 84-1439 (6th Cir. October 30, 1984); *Hochman, et al. v. GTE Corporation, et al.*, No. 83-4555 (D.N.J. 1983); *Retail Recruiters of New York, Inc. v. MCI Telecommunications Corp.*, No. 83 Civ. 8048 (S.D.N.Y. 1983), *appeal dismissed*, No. 84-7647 (2d Cir. October 31, 1984); *Schuster, supra*; *Lee, et al. v. Western Union, supra; Lee, et al. v. MCI, supra.*)

Kaplan retained jurisdiction over federal common law claims, but these were dismissed after transfer by the JPML. *In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F. Supp. 892 (E.D.Mich. 1985) *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-U.S. Transmission Systems, Inc., et al.*, (6th Cir. No. 85-1684).

in that transfer order.

US Tel moved to dismiss the instant Illinois state complaint on the alternative grounds that 1) the alleged state common law and statutory causes of action were preempted by the Federal Communications Act of 1934, 2) that the primary jurisdiction over the reasonableness of the acts and omissions alleged rested before the Federal Communications Commission, and 3) that Illinois statutes permit discretionary dismissal of a cause of action where the same cause is pending between the same parties elsewhere. The Illinois trial court granted the motion to dismiss for each of the three reasons stated and Speakers of Sport, Inc. appealed.

A similar purported class action complaint filed in Illinois on behalf of customers of Allnet Communications Services, Inc. had been dismissed by the Illinois trial court without appeal. *Discount Den, Inc. v. Allnet Communications Services, Inc.*, No. 84 CH 1059 (Cir. Ct. Cook Cty., Ill. 1984). In another such action against MCI Telecommunications Corp., the trial court denied a motion to dismiss on the same three grounds alleged by US Tel and MCI took an interlocutory appeal. *Kellerman v. MCI Telecommunications Corp.*, Nos. 82 CH 11065, 83 CH 6485, 83 CH 9919 (Cir. Ct. Cook Cty., Ill.).

Meanwhile, five Formal Complaints were filed before the FCC challenging these charges and the disclosure practices of the carriers. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al.*, FCC Dkt. Nos. E-84-6, E-84-11, E-84-12, E-84-13, E-84-18. The FCC recognized this to be an industry-wide problem. It held: 1) that the alleged charges were governed by the carriers' tariffs and Section 203 of the Communications Act; 2) that any billing errors were beyond the control of the carriers which had taken reasonable steps to eliminate the same; 3) that the carriers had instituted refund procedures for the billing errors; 4) that disclosure in the tariffs of the potential

errors was not necessary; and 5) that Sections 201(b) and 202(a) of the Communications Act governed the carriers non-tariff disclosures which the FCC reviewed to determine the reasonableness of disclosures to customers notifying them of potential billing errors and the procedures for refund. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc. et al.*, FCC Mimeo No. 703 (Released November 8, 1984).

In the multidistrict litigation, the District Court denied a motion to remand one of the complaints which was couched only in terms of state common law and statutory law holding that the claims were governed by the Communications Act. *In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp.*, 598 F. Supp. 951 (E.D. Mich. 1984). All of the purported class action Plaintiffs filed an amended consolidated complaint withdrawing all state grounds, alleging that the challenged billing and disclosure practices were violations of the Communications Act, of federal common law, and of the Racketeer Influenced and Corrupt Practices Act. 18 U.S.C. Sec. 1962. On the joint motion to dismiss filed by the carriers, including US Tel, the Federal District Court dismissed the amended consolidated complaint on the grounds that primary jurisdiction over the Federal Communications Act claims rested before the FCC, that the Communications Act specifically regulated the acts and omissions alleged in the complaints and therefor there was no purpose for the creation of federal common law, and that the plaintiffs failed to state a cause of action under RICO. *In re Long Distance Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services Inc., et al.*, 612 F. Supp. 892 (E.D. Mich. 1985), *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-US Transmission Systems, Inc., et al.*, (6th Cir. No. 85-1684). Subsequent complaints for alleging the same acts and omissions of the interstate telecommunications carriers continue to be filed and have been sent by

the JPML to the District Court for the Eastern District of Michigan. The District Court has dismissed those complaints on the same grounds.[2]

The Illinois Appellate Court and the Illinois Supreme Court affirmed the denial of MCI's motion to dismiss. Holding that there was a lack of authority regarding the preemptive effect of the Communications Act, the Illinois Supreme Court declined to follow the above cited federal court decisions or the FCC *Bill Correctors, Ltd.* decision on similar complaints.

> . . . (N)o Federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted.

Kellerman v. MCI, 112 Ill.2d 428, 444 (1986). *Kellerman* rejected the applicability of primary jurisdiction holding there was no need for FCC specialized or technical expertise, and further noted:

> The issue of whether defendant's failure to disclose certain charges is 'unjust or unreasonable' under Section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois statutes.

Kellerman, supra, 112 Ill.2d 428, 448 (1986). This Court denied MCI's petition for *certiorari* on the interlocutory appeal. *MCI Telecommunications Corp. v. Keller-*

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[2] *In re Long Distance Telecommunications Litigation: Lee, et al. v. Western Union Telegraph Co., et al.*, 639 F. Supp. 305 (E.D. Mich. 1986) *appeal pending* (6th Cir. No. 86-1599); *In re Long Distance Telecommunications Litigation: Solomon, et al. v. MCI Telecommunications Corp., et al.*, 647 F. Supp. 78 (E.D. Mich. 1986).

man, ___ U.S. ___, 107 S.Ct. 434 (1986).

US Tel cited the related federal court decisions and the FCC's *Bill Correctors, Ltd.* decision to the Illinois Appellate Court on appeal. The Appellate Court held that *Kellerman* was controlling and reversed the judgment of dismissal.

US Tel's Petition for Leave to Appeal to the Illinois Supreme Court was denied on April 15, 1987. The day prior, the FCC dismissed the Formal Complaint filed in *Locks* against US Tel finding that the reasonableness of the carrier's charges and charging practices are no longer an open question. The FCC further reviewed US Tel's disclosures regarding the potential billing errors and refund procedures also finding them to be reasonable and lawful. *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. No. E-86-66 (Released: April 14, 1987). US Tel filed a motion for leave to file a motion for reconsideration before the Illinois Supreme Court based upon the FCC's decision of *Locks*. This motion was denied on May 19, 1987.

The Illinois trial court has certified a nationwide class of MCI's customers in *Kellerman*. In a related case based on state law claims, the California state court has certified a statewide class of customers of GTE Sprint Communications Corporation in *Clothesrigger, Inc. v. GTE Corporation*, No. 515519 (Superior Ct. San Diego Cty., Cal.), with directions from the California Appellate Court to consider certification of a nationwide class. 191 Cal.App.3d 605, 236 Cal.Rptr. 605 (4th Dist. 1987) (*review denied* July 23, 1987). Another related class action complaint alleging state-law grounds has been filed in the Illinois state court, *Katz v. Allnet Communications Services, Inc.*, 87 CH 3728 (Cir. Ct. Cook Cty., Ill., 1987)

REASONS FOR GRANTING THE WRIT

This case raises in issue a vital point of federal law which this Court has not revisited in the 53 years since the passage of the Communications Act of 1934: the authority of state courts to entertain state common law and state statutory causes of action against interstate telecommunications carriers regarding charges and practices specifically regulated by the Federal Communications Commision pursuant to federal statute.

Prior to the Communications Act, this Court addressed this issue four times under the Act of 1910, which amended the Interstate Commerce Act to include all interstate communications, and universally held that state courts may not regulate through state-law claims the acts or omissions of carriers in the provision of interstate communications where those acts and omissions are regulated pursuant to the federal statute.

Despite 1) this Court's own holdings, 2) the decisions of five United States District Courts dismissing twenty-four similar complaints on the grounds of federal pre-emption and primary jurisdiction, and 3) decisions by the FCC on eleven related complaints holding the same charging and disclosure practices to be reasonable and lawful, the Illinois courts have decided that, in the absence of any ruling by this Court since the passage of the Communications Act in 1934, that they are authorized to independently determine the issue on behalf of all customers of the interstate carriers nationwide.

EFFECT ON EXISTING LITIGATION ON THE IDENTICAL ISSUE AND DECISIONS THEREON

The failure of the Court to reverse the Illinois courts will nullify the efforts of the federal courts in twenty-four related cases and eleven related FCC complaints, all of which have found that the same alleged acts or omissions of carriers in the provision of interstate communications

are regulated pursuant to the federal statute.

This case is of major importance in a telecommunications industry going through the throes of transition from monopoly to competitive interstate telecommunications. Thirty-one class action suits have been filed to date on this same contested matter.[3] Five different Federal District Courts have wrestled with the very claims in the instant case and have decided either 1) that federal law preempts state causes of action or 2) that primary jurisdiction requires referral of the instant matter to the FCC for the exercise of its administrative discretion. See Petition, p. 5, n. 1.

Given the increasing number of purported class action complaints being filed, the Judicial Panel for Multidistrict Litigation (JPML) decided that the necessities of judicial economy and consistency of ruling required that all of these related cases in the federal courts be transferred to the Eastern District of Michigan. *In re Long Distance Telecommunications Litigation*, MDL No. 598, *Transfer Order*, Appendix G. Consistent with the prior rulings, the District Court decided that state common law and statutory claims are pre-empted by federal law and that the matters alleged herein are governed by the Communications Act of 1934 (*In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp.*, 598 F. Supp. 951 (E.D. Mich. 1984)) and require deferral to the FCC for the exercise of its administrative discretion under the doctrine of primary jurisdiction. *In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F. Supp. 892 (E.D. Mich. 1985), *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-US Transmission Systems, Inc., et al.* (6th

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[3] All cases are listed in Table of Authorities under subheading "Related Cases", pp. vi-xii.

Cir. No. 85-1684).

In turn, the FCC has decided no less than eleven such complaints on two different occasions. In reviewing the initial five complaints under the title *Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al.*, FCC Mimeo No. 703 (Released November 8, 1984), the FCC stated that despite the deficiencies in the complaints, they raised industry-wide problems as to substantive practices which fell within the Commission's expertise and demanded an expeditious determination. The claims that interstate carriers were charging for uncompleted calls was directly regulated by the tariffs on file in Section 203 of the Communications Act. The Commission held that although interstate customers may occasionally be erroneously billed for uncompleted calls, these errors arise out of a technological problem known as the lack of answer supervision, that the carriers take specific measures to avoid such erroneous billings, and that the carriers do not charge for unanswered calls when notified of the error. Responding to the claim that the carriers have omitted to disclose this potential for billing errors, the Commission decided, under the discretion vested in it under Section 203 of the Communications Act, that the carriers need not make such disclosures in the filed tariffs. However, the FCC ruled that Sections 201(b) and 202(a) did require that the carriers reasonably disclose to their customers the potential for billing errors and the availability and procedure for obtaining refunds.

In a subsequent decision on the six complaints referred by the District Court, the FCC held that the charging practices of interstate carriers regarding the alleged uncompleted calls are no longer an open question. The FCC specifically reviewed the disclosure practices of US Tel, informing its customers of this potential billing error and refund rights and procedures, finding these disclosures to be reasonable and lawful as required by Section 201(b) of

the Communications Act. *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. No. E-86-066 (Released: April 14, 1987).

Although the Illinois Appellate Court was presented with the FCC's decision in *Bill Correctors, Ltd., supra*, no attempt was made to reconcile or distinguish the agency's determination. The Illinois court noted only that proceeding on the state-law claims would not present an obstacle to the accomplishment of Federal policy. *Speakers of Sport, Inc. v. U.S. Telephone, Inc., et al.*, 149 Ill.App.3d 898, 501 N.E.2d 318, 321 (1st Dist. 1986) *appeal denied* 114 Ill.2d 558, 501 N.E.2d 736 (1987), *citing Kellerman, et al. v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 443-44, 493 N.E.2d 1045 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 434 (1986).

The challenged problems caused by the lack of answer supervision arise directly from the FCC's determination to establish the competitive provision of interstate communications to fulfill its congressional mandate of ensuring nation-wide service at reasonable rates. *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971) *aff'd sub nom. Washington U.T. Commission v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975) *cert. denied* 423 U.S. 836 (1975); 47 U.S.C. § 151. Since then, the FCC has continuously addressed the problems arising from the lack of answer supervision as one of the telephone system's technological deficiencies in the transition from monopoly to competitive interstate services. *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 F.C.C.2d 440, 454 (1979); *MTS and WATS Market Structure*, 48 Fed.Reg. 42,984, 43,001-02 (1983), *aff'd sub nom. National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984). In further review of this problem, the FCC has now addressed the precise customer problems raised in the instant case: erroneous billings and disclosure of potential billing errors and of refund rights and procedures. *Bill*

Correctors, Ltd., supra; In re Certified Collateral Corp., supra. Despite the FCC's determination of these issues, the Illinois courts have ignored these rulings and proceed to make an independent review of Petitioner under the irreconcilable notion that compliance with the FCC's disclosures could be fraudulent and that charging pursuant to the tariff could be in breach of contract.

Only the granting of *certiorari* to the instant petition can prevent the Illinois courts from circumventing and undermining all of the decisions of the federal courts and the FCC since these complaints were initiated in 1983. No other state complaint is on appellate review and available by *certiorari* to this Court. Nor will any other federal decision alter the course of the Illinois courts which have expressly stated in their opinions that any federal determination of the reasonableness of the carriers' practices are irrelevent to the state-law claims alleged. *Speakers of Sport, Inc. v. U.S. Telephone, Inc., et al.*, 149 Ill.App.3d 898, 501 N.E.2d 318, 322 (1st Dist. 1986) *appeal denied* 114 Ill.2d 558, 501 N.E.2d 736 (1987); *See also Kellerman, et al. v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045, 1054 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 434 (1986). Failure to grant *certiorari* would permit all of the federal complaints to be refiled as nationwide class actions in the State of Illinois under state law theories raising the identical challenges rejected by the federal courts and the FCC, circumventing and nullifying the uniform federal decisions on thirty-five similar complaints.

THE DECISIONS OF THE ILLINOIS COURTS ARE AT ODDS WITH ALL FOUR EARLIER DECISIONS OF THIS COURT ON SAME ISSUE

Since Congress first occupied the field of interstate communications through the passage of the Act of 1910 amending the Act to Regulate Commerce, the United States Supreme Court has four times addressed the issue of the states' attempts to decide on grounds of state statutory

or common law the duties of carriers of interstate communications subject to federal regulation.

In *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U.S. 27 (1919), the Mississippi Supreme Court decision that the federal act did not preempt state common law contract actions by a customer against the interstate carrier was reversed. This Court said that to permit state common law contract actions would wholly destroy the mandated requirements of equality and national uniformity of rates by subjecting the same to diverse and possibly conflicting state laws. 251 U.S. at 30. The assertion of Congress to bring interstate transmissions under federal control occupied the whole field to the exclusion of state action. 251 U.S. at 31.

In *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315 (1920), the Indiana Supreme Court applied an Indiana statute for the negligent failure to deliver an interstate telegraph message. This Court reversed, holding that the clear purpose of Congress in assuming federal control over this area was to establish a uniform national rule leaving no room for the states to exercise their power to regulate. 251 U.S. at 316.

Further clarification of the relationship between the customer and the carrier in interstate transmissions came from Mr. Justice Brandeis in *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921). Esteve Bros. sued for a loss sustained due to Western Union's negligent international transmission of its message. In response to Western Union's assertion of its limitation of liability in its tariff on file with the Interstate Commerce Commission, Esteve Bros. replied that it neither knew of nor consented to such limitations and that Western Union omitted to disclose same. Based on a theory of common law contract, Esteve Bros. argued that it was not subject to such condition. Mr. Justice Brandeis noted the totality of the change affecting common law liability resulting from the federal

act:

> The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. . . .
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> . . . The rule does not rest on upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in (section) 3 of the Act to Regulate Commerce. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not. . . .

Esteve Bros. & Co., supra, 256 U.S. at 571-573.

In this Court's final pronouncement on this issue, the Alabama Supreme Court's decision that a state common law theory of gross negligence was not pre-empted by federal law was reversed with this Court again emphasizing that the common law liability and contractural restrictions subject to state laws have been superceded by federal legislation. *Western Union Telegraph Co. v. Priester*, 276 U.S. 252 (1928).

Federal regulation of interstate communications was restructured in 1934 by removing control of this area from the Interstate Commerce Commission and establishing the Federal Communications Commission to deal solely with the concerns of interstate communications. *See Benanti v. United States*, 355 U.S. 96, 104, n. 14. This reorganization was done without changing the substantive federal law on interstate communications. *See* 78 Cong. Rec. 10312-13 (Statement of Representative Rayburn, June 2, 1934).

In the fifty-three years since the passage of the Communications Act of 1934, this Court has not again addressed the issue of the states' attempts to uphold state common law and statutory causes of action against carriers of interstate communications in the face of federal regulation of the same. The Federal Circuit Court of Appeals have upheld the principles of federal pre-emption established by this Court. *O'Brien v. Western Union Telegraph Co.*, 113 F.2d 539 (1st Cir. 1940); *Ivy v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2nd Cir. 1968). Consistently, the United States District Courts have followed these opinions and the fundamental principle established by this Court sixty-eight years ago. These federal courts have recognized that these same state-law claims are regulated by the Communications Act of 1934 and subject to the jurisdiction of the FCC. *In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp., supra*, 598 F. Supp. 951 (E.D. Mich. 1984); *In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al., supra*, 612 F.Supp. 892 (E.D. Mich. 1985). *See also* Petition, p. 5, n. 1. The FCC itself has specifically found that these complaints are within its expertise and raise industry-wide concerns regarding charging practices and disclosure practices of interstate carriers. *Bill Correctors, Ltd., supra*, FCC Mimeo 703; *In re Certified Collateral Corp., supra*, Appendix E.

Illinois courts have attempted to ignore or distinguish these related and contrary federal decisions by stating that the issue of whether defendant's failure to disclose certain charges is "unjust or unreasonable" under Section 201(b) of the Communications Act has no relevence as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes." *Speakers of Sport, Inc., supra*, 501 N.E.2d at 322 (1986), citing *Kellerman, supra*, 112 Ill.2d 428, 448-49 (1986). The Illinois courts have sought to avoid the consistent rulings of federal pre-emption by the labeling placed on the causes of action in terms of state common law and state statutory law.

Just last term, this Court specifically rejected the theory that pre-emption of matters subject to federal law may be avoided by the mere relabeling of those matters in terms of state common law or statutory law. *IBEW v. Hechler*, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 791 (1987).

In *Hechler*, the United States Court of Appeals for the Eleventh Circuit attempted to distinguish a pre-emption ruling by this Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) that the legal consequences intended to flow from breaches of a collective bargaining agreement must be resolved by reference to uniform federal law. Attempting to distinguish the complaint before it, the Eleventh Circuit held that although the employee was governed by the collective bargaining agreement, the employee's claim was essentially one of common law negligence alleging a duty of care under tort law. This Court reversed the Eleventh Circuit noting that:

> (t)he need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of Section 301 by casting her claim as a state-law tort action. 95 L.Ed.2d at 803.

The Illinois Appellate Court attempts to do what this

Court refused to permit in *Hechler*. A complaint identical to the instant proceedings was filed in *Locks* in the federal courts. *See* Appendix I. That complaint made its way through the federal system to the FCC which dismissed the complaint after reviewing the practices of the Petitioner, finding that the Petitioner's alleged acts and omissions were governed by the Communications Act and were reasonable and lawful. *In re Certified Collateral, supra*, Appendix E. Nevertheless, the Illinois courts attempt to relitigate that complaint solely because of the state-law labels attached by the respondent. *Certiorari* must be granted to enforce this Court's rulings that state-law labels may not circumvent the pre-emptive effect of uniform federal law.

THE RECENT REJECTION BY THE FCC OF THE SAME ALLEGATIONS PRE-EMPTS STATE-LAW CLAIMS

During the pendency of these proceedings, the identical allegations against US Tel to the instant case were rejected by the FCC. *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. No. E-86-66 (Released: April 14, 1987). This decision was presented to the Illinois Supreme Court in the form of a motion for leave to file a motion for reconsideration of the denial of the petition for leave to appeal. The motion was denied. Appendix B. Nevertheless, the FCC has specifically reviewed and rejected the class allegations regarding US Tel's charging practices and regarding US Tel's disclosures to its customers, the alleged class, finding them to be reasonable and lawful. Given this determination, the Illinois courts are pre-empted from attempting to usurp the function that Congress has assigned to the federal regulatory body. United States Constitution, Article VI, Clause 2; *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

In *Kalo Brick*, this Court rejected the Iowa Appellate

Court's attempt to distinguish state-law claims as creating separate duties from the federal act. Noting that "the court's concern is necessarily with the nature of the activities which the states have sought to regulate, rather than the method of regulation adopted . . . ," (450 U.S. at 317-18) this Court ruled that states may not entertain state-law claims in an attempt to regulate through the threat of damages, conduct which has been approved by the federal agency. 450 U.S. at 325-6. Rejecting the argument that the savings clause permits state actions, the Court held that:

> " 'no court has jurisdiction' of a suit such as respondent's until the Commission 'has declared the practice to be . . . unjust.' (citation omitted) And the Commission, in the exercise of its discretion, has done precisely the opposite; it has decided that the (carrier's action) was proper . . . . "

450 U.S. at 330.

As in the instant case, the Commission in *Kalo Brick* did not rule until after the initiation of the state lawsuit. Nevertheless, the Court held that the state courts are bound by that determination. The Illinois courts seek to avoid the federal regulatory decision, as did the Iowa Appellate Court, and circumvent the authority vested by Congress in the FCC. Although prohibited by this Court's decisions, this usurpation can be prevented only by the granting of the instant petition.

AVOIDANCE OF PRIMARY JURISDICTION REFERRAL TO THE FCC IS LEGALLY UNSUPPORTABLE

The doctrine of primary jurisdiction requires courts to defer to administrative bodies questions involving the reasonableness of an interstate communications carrier's practices before any court proceeding. *Booth v. American Telephone and Telegraph Company*, 253 F.2d 57 (7th Cir. 1958). No court has juridiction of a suit until the Commis-

sion has declared the practice to be unjust. *See Chicago & North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 330 (1981). Despite the repeated application of the doctrine by the Federal District Courts in identical actions, the Illinois Appellate Court, relying upon *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), refuses to defer to the federal agency vested by Congress with the administrative discretion in this matter.

Although *Nader* involved a claim of fraudulent omission, this Court did not hold in that case that no federal agency has authority over disclosures. It held that under the Federal Aviation Act no purpose would be served by deferring that respondent's claim to the Civil Aeronautics Board. This Court found that Congress only vested the CAB with jurisdiction over the public interest and with authority to enter cease and desist orders. Congress did not vest the CAB with authority to entertain a private claim, nor to grant a private remedy. Individual consumers could not even initiate proceedings. 426 U.S. at 301-02.

In total contrast to the Federal Aviation Act, the Communications Act specifically governs Respondent's private challenges to the Petitioner's charges (47 U.S.C. Sec. 203) and disclosures (47 U.S.C. Secs. 201(b), 202(a)) as expressly found by the FCC. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al.*, FCC Mimeo No. 703 (Released: November 8, 1984); *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. Nos. E-86-63 through 68, 2 F.C.C. Rcd. 2171 (Released: April 14, 1987). Unlike the Federal Aviation Act, Congress provided for the FCC to entertain private complaints, (47 U.S.C. Secs. 207, 208), for the award of damages (47 U.S.C. Secs. 206, 209), for enforcement of its orders, (47 U.S.C. Sec. 401(b)), and for appellate review of its decisions. 47 U.S.C. Secs. 402(a), 407; 28 U.S.C. Sec. 2342. Furthermore, the FCC is vested with the administrative discretion to prescribe the conduct of the

Petitioner. 47 U.S.C. Sec. 205(a).

In *Bill Correctors, Ltd.* and *In re Certified Collateral Corp.*, the FCC has already reviewed eleven private complaints concerning the same allegations as the instant case, including its companion case of *Locks v. U.S. Telephone of the Midwest, Inc., decided sub nom. In re Certified Collateral Corp.*, FCC No. E-86-66.

Nader expressly noted that given the above statutory provisions, this Court has *required* deferral to the federal agency, citing *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). *Nader*, 426 U.S. at 301. *United States Navigation Co.* rested upon this Court's interpretations of the Interstate Commerce Act which then was the act regulating interstate communications. The above provisions were transferred without substantive change from that Act to the Communications Act creating the FCC. 78 *Cong. Rec.* 10312-13 (Statement of Representative Rayburn, June 2, 1934). This Court noted in *Nader* that these provisions indicated Congressional intent to vest both restrictive and permissive authority in the federal agency with complete power over the private complaint. Even if the allegations may appear bad on their face, given the technical and commercial context of all attending circumstances the agency may approve or allow the practices with modification. However, the uniformity which is the purpose of the Act could not be obtained without resort to the Commission. *United States Navigation*, 284 U.S. at 482.

Although the District Courts have followed this distinction and found *United States Navigation Co.* controlling (*In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communication Services, Inc., et al., supra*, 612 F. Supp. 892 (E.D. Mich. 1985)), the Illinois Appellate Court has failed to recognize it and threatens to undermine all of the District Courts' and FCC decisions unless this petition is granted.

THE INSTANT CASE IS THE FLIP-SIDE OF THE LOUISIANA PUBLIC SERVICE COMMISSION CASE IN THAT IT DEALS WITH THE STATES' INTERFERENCE WITH FCC DECISIONS IN INTERSTATE COMMUNICATIONS

In the recent decision of *Louisiana Public Service Commission v. the FCC*, 476 U.S. ___, 106 S.Ct. 1890 (1986) this Court recognized that there are numerous policy considerations in the restructuring of the telecommunications industry but held that the Communications Act nevertheless restricted the FCC from interfering in matters of intrastate communications. This case represents the opposite situation in that the policy considerations relevant in these matters concern the states' interference with the FCC decisions in interstate communications.

In light of this Court's decision in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), the Illinois court has certified *Kellerman, supra*, as a national class and will be entertaining nationwide policy determinations regarding interstate communications. Although it was the Congressional intent to vest this authority in the FCC, a single expert body which would determine, on a uniform national basis, the regulation of interstate communications, the effect of the Illinois courts' decisions in these proceedings has transferred that authority from the FCC to a trial court in the Circuit Court of Cook County, Illinois. Given the California state court proceedings in *Clothesrigger, Inc. v. GTE Corporation, supra*, it is readily forseeable that different nationwide standards will be set by different state courts for different interstate carriers or even for different sub-classes of customers of the same carriers. This would destroy the Congressional purpose of nationwide equality and uniformity in interstate communications established seventy-six years ago. It is crucially important for this Court to grant the instant petition for writ of *certiorari* to reaffirm the fundamental principles of federal regulation over interstate communications.

CONCLUSION

For all of the foregoing reasons, US Telecom, Inc., f/k/a U.S. Telephone, Inc. and U.S. Telephone of the Midwest, Inc., respectfully requests this Court to grant the petition for writ of *certiorari*.

Respectfully submitted:

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